

**IN THE MATTER OF THE CLAIM
OF LAMONT KAPEC,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF ROBERT SPERO, T/A
MARYLAND POOLS INC.,
RESPONDENT**

*** BEFORE TARA K. LEHNER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
*
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* OAH No.: DLR-HIC-02-16-37277
* MHIC No.: 16 (05) 47**

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PROPOSED DECISION¹

**STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER**

STATEMENT OF THE CASE

On October 23, 2015, Lamont Kapec (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of

¹ The Code of Maryland Regulation (COMAR) 09.08.02.01B provides that “[a]ll contested case hearings delegated to the Office of Administrative Hearings shall be governed by COMAR 09.01.03.” COMAR 09.01.03.08 states:

- A. Upon completion of the hearing, the ALJ shall submit a proposed decision to the administrative unit.
- ...
- C. The proposed decision shall comply with the requirements of the Administrative Procedure Act and COMAR 28.02.01.22, and shall include:
 - (1) Written findings of fact;
 - (2) Proposed conclusions of law; and
 - (3) A recommended order.
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\$11,604.00 in alleged actual losses suffered as a result of a home improvement contract with Robert Spero (Respondent), trading as Maryland Pools Inc.

I held a hearing on April 4, 2017, at the Frederick County Department of Social Services, 100 East All Saints Street, Room 2C, Frederick, Maryland 21701 (Frederick DSS). Md. Code Ann., Bus. Reg. §§ 8-312(a), 8-407(e) (2015).² The Claimant appeared and represented himself. The Respondent and his attorney of record, Robert M. Stahl, Esquire, did not appear for the hearing. Andrew Brouwer, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), appeared as counsel to the Fund. The Fund did not send a party representative.

The contested case provisions of the Administrative Procedure Act, the MHIC procedural regulations, and the Rules of Procedure of the Office of Administrative Hearings (OAH) govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2016); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02.01B, 28.02.01.

ISSUES

Did the Claimant sustain an actual loss compensable by the Fund as a result of any acts or omissions of the Respondent, and if so, what amount may the Claimant receive from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on behalf of the Fund:

GF Ex. 1 MHIC Hearing Order, October 17, 2016

GF Ex. 2 Notice of Hearing, January 5, 2017

² Unless otherwise noted, all references hereinafter to the Business Regulation Article in the Annotated Code of Maryland are to the 2015 Replacement Volume.

- GF Ex. 3 Letter from the MHIC to the Respondent, November 2, 2015, with Claimant's Claim Form, received by MHIC October 23, 2015 attached
- GF Ex. 4 MHIC Licensing Information for the Respondent, printed March 24, 2017

I admitted the following exhibits on behalf of the Claimant:

- Cl. Ex. 1 Contract between Claimant and Maryland Pools Inc., May 11, 2011
- Cl. Ex. 2 Emails between Claimant, Respondent, Maryland Pools, Inc. and Wilcoxon Construction, Inc. (Wilcoxon) with attached pictures, various dates in June through October 2014, and May 2015
- Cl. Ex. 3 Estimate from Wilcoxon, June 4, 2015
- Cl. Ex. 4 Swimming Pool Proposal from Pearl, June 3, 2015

No exhibits were offered by the Respondent.

Testimony

The Claimant testified on his own behalf. He did not call any other witnesses.

The Respondent was not present to testify or to call witnesses.

The Fund did not call any witnesses.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject matter of this hearing, the Respondent, who traded as Maryland Pools Inc. (Maryland Pools), was licensed as a home improvement contractor under MHIC license numbers 01-93100 (Individual License) and 05-6694 (Company License).
2. The Respondent's address associated with his MHIC Individual License is 18 Trojan Horse Drive, Phoenix, Maryland 21131 (Individual Address). The Respondent's address associated with his MHIC Company License is 9515 Gerwig Lane, #121, Columbia, Maryland 21046 (Company Address).
3. On or about May 11, 2011, the Claimant and Maryland Pools entered into a contract for the installation of a pool (Contract). The Contract price was \$43,124.00.

4. Maryland Pools completed the work under the Contract in August 2011 and the Claimant paid Maryland Pools \$43,124.00. The Claimant had no issues with the pool through April 2014.

5. At the end of May 2014, the Claimant opened the pool for the season. He immediately noticed multiple cracks in the steps of the pool, including a crack that ran from the base of the steps to up and over the first step.

6. On June 5, 2014, the Claimant called Maryland Pools to discuss the cracks. He also emailed Maryland Pools on June 9 and 10, 2014.

7. On June 13, 2014, the Claimant spoke to the Respondent. The Claimant agreed to send the Respondent a picture of the cracks, which the Claimant emailed to the Respondent on June 17, 2014.

8. On July 8, 2014, the Respondent acknowledged receipt of the picture from the Claimant and stated that he would have someone go to the Claimant's home to inspect the pool.

9. On September 23 and 25, 2014, the Claimant emailed the Respondent asking for the Respondent and/or Maryland Pools to repair the cracks in the pool. On October 27, 2014, the Claimant advised the Respondent that because there has been no attempt by the Respondent or Maryland Pools to repair the cracks, the Claimant intended to file a claim against the Fund.

10. On October 28, 2014, Bob Brucksch, a Construction Manager with Maryland Pools, emailed the Claimant to state that Maryland Pools would repair the cracks in the pool in early Spring 2015. The email was also addressed to the Respondent. In this email, Mr. Brucksch agreed that Maryland Pools would perform the following to make the repair: drain the pool; protectively cover the areas of the pool not being repaired; remove the plaster and loose gunite³;

³ Gunite is a mixture of cement, sand or crushed slag and water, sprayed over reinforcement as a lightweight concrete construction. See Dictionary.com at <http://www.dictionary.com/browse/gunite>.

cut and chip the plaster to provide a straight cut transition for the new and old plaster; drill, dowel and shoot the steps with gunite as needed to ensure a strong bond; and plaster the area cut out for repairs with White Marble plaster. The email stated that it would be the Claimant's responsibility to refill the pool.

11. On May 8 and 11, 2015, the Claimant emailed the Respondent and Mr. Brucksch to see when the repair would begin. No one from Maryland Pools ever responded to the Claimant.

12. As of the date of the hearing, the Respondent and/or Maryland Pools had not repaired the cracks in the pool.

13. As of the date of the hearing, two of the steps remained cracked.

14. In June 2015, the Claimant received an estimate from Wilcoxon for the repair of the pool steps. Wilcoxon stated it would charge the Claimant the following to make repairs:

- Drain and clean the pool \$877.00
- Cut and strip plaster off each step at \$535.00/step \$1,070.00
- Permakote both steps \$228.00
- Replaster both steps \$2,846.00
- Main swimming pool, prepare surface/replaster \$6,583.00
- Repair of the beam:
 - 0" to 6" in depth - \$41.00/per linear foot unknown
 - 6" to 12" in depth - \$72.00/per linear foot unknown

15. In June 2015, the Claimant received an estimate from Pearl for the repair of the pool steps. Pearl stated it would charge the Claimant the following to make repairs:

- Remove and replace waterline tile \$2,640.00
- Remove and replace existing coping \$5,280.00

- Remove and reinstall steps \$8,000.00
- Caulk \$825.00
- Prep and plaster interior of swimming pool \$4,990.00

16. On or about July 6, 2015, Maryland Pools filed a voluntary bankruptcy petition with the United States Bankruptcy Court in Baltimore, Maryland.

17. On October 23, 2015, the Claimant filed the Claim with the MHIC.

18. On November 2, 2015, the Fund notified the Respondent via a letter to his Company Address that a Claim had been filed against him by the Claimant.

19. On October 17, 2016, the MHIC issued a Hearing Order stating that it was referring the Claim to the OAH for a hearing.

20. On January 5, 2017, the OAH mailed a Notice of Hearing (Notice) by United States Postal Service (USPS) Certified Mail Return Receipt and by First Class Mail to the Respondent's Individual Address and to his attorney of record, Robert M. Stahl, Esquire. This Notice advised the Respondent that a hearing was scheduled for April 4, 2017, at 10:00 a.m., at the Frederick DSS.

21. The Certified Mail Return Receipt for the Notice mailed to the Respondent's Individual Address was signed as received by Patti Spero on January 7, 2017. The Certified Mail Return Receipt for the Notice mailed to Mr. Stahl was signed as received on January 9, 2017 by N. Lyeus. The First Class Mail Notices were not returned to the OAH by the USPS.

22. On January 20, 2017, Mr. Stahl wrote a letter to the OAH, identifying himself as the attorney for the Respondent and Maryland Pools, and asked the OAH to stay this case because Maryland Pools had filed a voluntary bankruptcy petition. The request for stay was denied.

23. No party made a request to postpone the April 4, 2017 hearing.

24. The Contract contains an arbitration clause. As of the date of the hearing, the Respondent had not advised the Claimant, the MHIC or the OAH that he intends to participate in arbitration of the issues underlying this Claim.

25. Besides the January 20, 2017 letter from Mr. Stahl, neither the Respondent, nor anyone authorized to represent him, initiated any contact with the Claimant, the MHIC or the OAH after the filing of this Claim.

26. The Claimant and his spouse are not: a spouse or other immediate relative of the Respondent; an employee, officer, or partner of the Respondent; or an immediate relative of an employee, officer, or partner of the Respondent.

27. The Claimant has not taken any action to recover monies for the Respondent's and/or Maryland Pool's failure to repair the pool steps, other than the instant Claim.

28. The property where the Contract work was performed is the Claimant's only residential property in Maryland and it is his primary residence.

DISCUSSION

The Respondent's failure to appear

As discussed in the Findings of Fact above, the OAH mailed the Notice regarding the date, time and location of this hearing, via both First Class and Certified Mail, to the Respondent, individually and as the representative of Maryland Pools, to his Individual Address. The Notice was also mailed, via both First Class and Certified Mail, to Mr. Stahl, the attorney representing both the Respondent and Maryland Pools. The Certified Mail Notices were signed as received by someone at both the Respondent's and Mr. Stahl's address. The First Class Mail Notices were not returned to the OAH by the USPS.

On April 4, 2017, at 10:00 a.m., I convened a hearing in this case at the Frederick DSS. By 10:20 a.m., neither the Respondent, nor anyone claiming to represent the Respondent, appeared for the hearing. The OAH did not receive any request for postponement of the hearing.

The Respondent was properly notified of the date, time and location of this hearing. The Notice was mailed just shy of three months before the scheduled hearing by both First Class and Certified Mail to the address the Respondent provided to the MHIC. Md. Code Ann., Bus. Reg. § 8-312(d)⁴ (the hearing notice shall be sent at least ten days before the hearing by certified mail to the business address of the licensee on record with the MHIC); *see also id.* § 8-407(a). The Notice was also mailed to his attorney of record. Despite proper notice being sent, the Respondent failed to appear for the hearing. As a result, I proceeded with the hearing in the Respondent's absence. COMAR 28.02.01.23A.

Merits of the Claim

A claimant bears the burden of proof, by a preponderance of the evidence, that it is entitled to an award from the Fund. Md. Code Ann., Bus. Reg. § 8-407(e)(1); COMAR 09.08.03.03A(3); Md. Code Ann., State Gov't § 10-217 (2014). A claimant may recover compensation from the Fund "for an actual loss that results from an act or omission by a licensed contractor" Md. Code Ann., Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) ("The Fund may only compensate claimants for actual losses . . . incurred as a result of misconduct by a licensed contractor."). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401. However, the Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney's fees, court costs, or interest,

⁴ Unless otherwise noted, all references hereinafter to the Business Regulation Article in the Annotated Code of Maryland are to the 2015 Replacement Volume.

COMAR 09.08.03.03B(1), and may not compensate a claimant for more than was paid to the original contractor. Md. Code Ann., Bus. Reg. § 8-405(e)(1)(5).⁵

1. Arbitration Clause

The Contract between the Claimant and Maryland Pools contains an arbitration clause, which states, in pertinent part, as follows:

Any controversy, action, claim, dispute, breach or questions of interpretation relating to or arising out of this contract shall be resolved by arbitration in accordance with Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction.

...
Under Business Regulation Article SS8-405(C) [sic], Annotated Code of Maryland, a claim against the Home Improvement Guaranty Fund by an owner shall be stayed until completion of any mandatory arbitration proceeding.

See Cl. Ex. 1, Section 9.

Section 8-405(c) requires that the Claimant prove that he complied with any contract arbitration clause before seeking compensation from the Fund. Md. Code Ann., Bus. Reg. § 8-405(c). Additionally, COMAR 09.08.03.02E provides:

E. Compulsory Binding Arbitration. When a contract between a claimant and a contractor requires that all contract disputes be submitted to binding arbitration, the claimant shall either:

- (1) Submit their dispute to binding arbitration as required by the contract;
- or
- (2) Provide evidence to the Commission that the claimant has made good faith efforts to bring the dispute to binding arbitration which the contractor

⁵ A claimant must also prove that at all relevant times: (a) the owner owned fewer than three dwelling places or resides in the home as to which the claim is made; (b) the owner was not an employee, officer or partner of the contractor or the spouse or other immediate relative of the contractor or the contractor's employees, officers or partners; (c) the work at issue did not involve new home construction; (d) the owner did not unreasonably reject the contractor's good faith effort to resolve the claim; (e) there is no pending claim for the same loss in any court of competent jurisdiction and the owner did not recover for the actual loss from any source; and (f) the owner filed the claim with the MHIC within three years of the date the owner knew or with reasonable diligence should have known of the loss or damage. Bus. Reg. §§ 8-405(d), (f), and (g), 8-408(b)(1) and (2), and 8-108(g)(3)(i) (Supp. 2016). The Claimant provided uncontroverted evidence that he meets all of the above-enumerated requirements, and the Fund did not challenge any of the Claimant's evidence.

has either rejected or not responded to. The Commission shall then give the contractor written notice that, if the contractor does not agree to binding arbitration, the Commission will consider the compulsory arbitration clause to be void and process the claimant's claim pursuant to this chapter.

COMAR 09.08.03.02E.

At the hearing, Mr. Brouwer, the Assistant Attorney General representing the Fund, stated that the MHIC is aware that the Contract contains this arbitration clause, and proffered that it is the MHIC's position that the Respondent waived his contractual right to compel arbitration and that the Claim may properly be considered at this time.⁶

Section 8-405(c) of the Business Regulation Article protects the Fund from being depleted and ensures its continued solvency for the payment of future claims. Section 8-410 provides that once the MHIC pays a claim, the MHIC is subrogated to all rights of the claimant, and the MHIC may sue the contractor for the amount paid by the Fund on the claim. Md. Code Ann., Bus. Reg. § 8-410(a) and (b). This subrogation right allows the Fund to collect from the offending contractor what it has paid to a claimant, thus replenishing the Fund so that it continues to have sufficient resources to make payments on future awards.⁷ However, when the MHIC initiates a lawsuit against a contractor, the MHIC steps into the shoes of the claimant, and the contractor may assert any defenses against the MHIC that it would have had against the claimant, including the claimant's failure to bring the dispute to arbitration. *See Hill v. Cross*

⁶ The Contract was not executed by the Respondent; but rather, it was executed by a salesman on behalf of Maryland Pools. However, as discussed in the Court of Special Appeals in *Case Handyman & Remodeling Services, LLC v. Schuele*, the principles of equitable estoppel mandate that the Respondent may compel arbitration. 183 Md. App. 44, 62 (2008) (“[A] non-signatory of an applicable arbitration contract can enforce an arbitration clause under the doctrine of equitable estoppel when the signatory's claims against the non-signatory rely on the written agreement.” (footnote omitted)), *vacated on other grounds*, 412 Md. 555 (2010).

⁷ The MHIC has been tasked with the establishment and administration of the Fund. *See* Md. Code Ann., Bus. Reg. § 8-403(a) and (c). The Fund is supported by initial fees and assessments from licensed contractors and from reimbursements the MHIC collects from the contractors who give rise to claims. *Id.* §§ 8-404, 8-410. If the Fund does not have sufficient money to cover an award, the claimant must wait until there is enough money to pay the claim. *Id.* § 8-409(c). Thus, the MHIC has a policy interest in preserving the Fund so that it is available for all claimants.

Country Settlements, LLC, 402 Md. 281, 313 (2007) (the substituted person “can exercise no right not possessed by his predecessor, and can only exercise such right under the same conditions and limitations as were binding on his predecessor.”) (quoting *Poe v. Phila. Cas. Co.*, 118 Md. 347, 353 (1912)). Accordingly, to ensure the continued solvency of the Fund through future subrogation actions against contractors, section 8-405(c) limits the MHIC’s ability to pay an award from the Fund when a claimant has not complied with a contract arbitration clause.

There are times, however, when a contract at issue in a claim contains an arbitration clause, but a claimant is unable to engage the contractor in arbitration. Clearly, the purpose of the Fund is to compensate homeowners for actual losses incurred at the hands of a licensed contractor, and this dictates that a claimant, who is barred from complying with a contract arbitration clause due to the actions of a contractor, should nevertheless be permitted to seek recovery from the Fund.

Maryland courts recognize that the right to arbitrate is a right created by contract, and that a party to that contract may waive its right to arbitrate. 2 Maryland Law Encyclopedia, *Alternative Dispute Resolution* § 23 (Westlaw 2017); see also *Brendsel v. Winchester Const. Co., Inc.*, 162 Md. App. 558, 573, cert. granted, 389 Md. 124 (2005), *aff’d*, 392 Md. 601(2006). Usually, a court will only determine that a party waived its right when it does so through unequivocal acts or language. *Brendsel*, 162 Md. App. at 574. However, it is possible for waiver to be established when a party delays in demanding arbitration. *Id.* at 573; see also *Redemptorists v. Coulthard Servs., Inc.*, 145 Md. App. 116, 141 (2002). COMAR 09.08.03.02E is a mechanism for the Fund to establish that a contractor waived arbitration with a claimant. If the MHIC follows the procedures contained in COMAR 09.08.03.02E, it creates a factual record that may be used in any future subrogation lawsuit against defense of “failure to arbitrate” asserted by the contractor.

Clearly, however, if the facts of a particular case already are sufficient to prove waiver of the arbitration clause by the contractor, it is unnecessary for the MHIC to follow the provisions of COMAR 09.08.03.02E. In this case, there is abundant evidence to support the MHIC's position that the Respondent's action in this case, or more accurately his inaction, amounts to a waiver of his right to arbitrate, and therefore, it was unnecessary for the MHIC to require that it and the Claimant strictly adhere to the procedures outlined in COMAR 09.08.03.02E. The Respondent has known that this Claim was pending before the Fund for the seventeen months prior to this hearing. *See* GF Ex. 3 (November 2, 2015 letter to the Respondent advising him that this Claim was pending against the Fund). Additionally, the Respondent was reminded of the pendency of this Claim through the January 5, 2017 Notice of Hearing. *See* GF Ex. 2. Despite this repeated actual notice, the Respondent never attempted to compel arbitration either through the Claimant, the MHIC, or the OAH. Specifically, the Claimant testified that the Respondent never contacted him about submitting the claim to arbitration, Mr. Brouwer proffered that the Respondent never contacted the MHIC to demand that the matter be submitted to arbitration, and the OAH case file does not include any correspondence from the Respondent addressing arbitration. Most interestingly, on January 20, 2017, Mr. Stahl contacted the OAH on behalf of the Respondent and Maryland Pools, and requested that the hearing on the Claim be stayed pending Maryland Pool's voluntary bankruptcy petition; however, Mr. Stahl's letter was silent regarding arbitration. *See* OAH Case File, docket entry 3. Finally, the Respondent did not avail himself of his right to attend the hearing on the Claim and to object to the hearing of the matter prior to arbitration.

Based on these facts, I conclude that the Respondent waived his right to arbitrate this Claim, and that it was appropriate for the MHIC to forward this Claim for a merits hearing, despite the presence of an arbitration clause in the Contract and despite the Claimant's and the MHIC's strict adherence to the procedures contained in COMAR 09.08.03.02E.⁸

2. Actual Loss and Amount of Award

There is no dispute that the Respondent completed the work under Contract in August 2011, and that the Claimant paid the Respondent the full Contract amount due, based on the Claimant's belief and understanding that the pool was built as contracted. The issue before me is whether the Respondent's work, as completed, was inadequate and/or unworkmanlike, and if so, the extent of the actual loss suffered by the Claimant. As will be discussed in further detail below, I find that the Claimant produced compelling evidence that the Respondent's work was inadequate and unworkmanlike.

In May 2014, less than three years after the installation of the pool, the Claimant observed cracks on the steps in the pool. The Limited Warranty (Warranty) offered by the Respondent with the Contract states that Maryland Pools warrants the pool will be free of structural cracks for as long as the Claimant owns the pool. The Warranty also states that if a crack or leak develops, Maryland Pools will make the repair.

At the hearing, the Claimant offered a photograph⁹ that clearly documents that the steps installed by the Respondent have significant cracks, the largest of which starts at the base of the pool and travels up and over the first step. The Claimant testified that, since then, the cracks have spread to cover two steps of the pool.

⁸ Although, for purposes of whether an award should be made to the Claimant from the Fund I conclude that the Respondent waived his right to arbitrate, the court that presides over the subrogation case will render its own determination on that issue.

⁹ The photograph is an attachment to an email sent from the Claimant to the Respondent on June 17, 2014, depicting the then current state of the cracks in the pool.

I do not need expert testimony to conclude the Respondent's work is inadequate and unworkmanlike. Expert testimony is not necessary in instances where the deviation from applicable industry standards is so obvious that the trier of fact can easily recognize that it violates the applicable standard. *Schultz v. Bank of America, N.A.*, 413 Md. 15, 29 (2010). The picture documents significant cracking that even I, as a lay person, can recognize falls outside of the scope of acceptable pool construction. Additionally, the Respondent's Warranty provides for the repair of any cracks for as long as the Claimant owns the pool. This further demonstrates that it is unexpected and surprising for there to be cracks in the pool and creates an inference that the steps of the pool were installed by the Respondent in an inadequate and unworkmanlike manner, and this inference was not disproven by the Respondent.

The Claimant also produced abundant evidence that he gave the Respondent every chance to repair the cracks. The emails in evidence document that the Respondent was non-responsive for much of the summer of 2014, and that in October 2014, the Respondent's employee promised that Maryland Pools would repair the pool in the Spring of 2015, but never reinitiated contact with the Claimant.

Based on the above, I find that the pool installation by the Respondent was inadequate and unworkmanlike, and, thus, the Claimant is eligible for an award from the Fund for his actual loss. Bus. Reg. §§ 8-401 and 8-405(a).

Proposed Award

The Claimant makes a demand for the \$11, 604.00 that he states he will need to pay either Wilcoxon or Pearl, both MHIC licensed contractors, to repair the pool.

Both the Wilcoxon and Pearl estimates provide for similar repairs as offered by Maryland Pools in its October 28, 2014 email. The work to be completed includes draining the pool, removing the plaster, and repairing and replastering the steps. The Wilcoxon estimate provides as follows:

• Drain the pool	\$877.00
• Remove plaster	\$1,070.00
• Repair the steps	\$228.00
• <u>Replaster the steps</u>	<u>\$2,846.00</u>
• Total	\$5,021.00

CL Ex. 3.

The Pearl estimate lumps all of these activities in one figure of \$8,000.00. CL Ex. 4.

The Wilcoxon estimate includes repairing a "beam." As a lay person, I am unable to determine whether the step cracks were the result of inadequate plaster work or whether they were caused by an underlying structural deficiency that requires repair of the beam of the pool. The Claimant did not offer expert evidence that would assist me in making this conclusion. Thus, the Claimant has not proven that beam repair is required to repair the Respondent's inadequate work, and thus, I will not recommend an award for it.

Both the Wilcoxon and Pearls estimates include a figure for replastering the entire main swimming pool and the Pearl estimate includes figures for the removal and replacement of tile and coping. There is no evidence in the record that there was any damage to the tile, coping or the main pool plaster, and there is similarly no expert evidence that the repair of the step cracks would require the removal and replacement of the coping, tile, and main pool plaster. Again, as a lay person, I do not have the knowledge, skills, or ability to determine whether the repair of the steps would require this additional work. Thus, similarly, I will not recommend an award for it.

The Fund recommended that I use the formula set forth in COMAR 09.08.03.03B(3)(c), which provides that if a contractor did work according to a contract and a claimant has solicited

or is soliciting another contractor to perform repairs of the contractor's inadequate work, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract, less the original contract price. Based on the facts of this case, I agree this is the appropriate formula. I also conclude that the less expensive Wilcoxon estimate of \$5,021.00 is the appropriate estimate to use in this case.

It is undisputed that the Claimant paid the Respondent the total Contract price of \$43,124.00. Using that formula, the computation is as follows:

Amount paid to the Respondent:	\$43,124.00
<i>Plus</i> amount payable to repair and replace:	\$5,021.00
Total:	\$48,145.00
<i>Minus</i> Contract price	\$43,124.00
Actual Loss:	\$5,021.00

Pursuant to the applicable law, the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimant to the Respondent. Md. Code Ann., Bus. Reg. § 8-405(e)(1), (5). The Claimant's actual loss of \$5,021.00 is not limited by this provision of law.

During the hearing, Mr. Brouwer stated that this case is only one of many against Maryland Pools. Section 8-405(e)(2) of the Business Regulation Article provides for a statutory cap of \$100,000.00 to cover all claimants for the acts or omissions of one contractor, unless the contractor reimburses the Fund. Thus, although I recommend an award of \$5,021.00 to the Claimant, this award may be limited by the statutory cap of section 8-405(e)(2).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss as a result of the Respondent's acts and omissions, and that an appropriate award in this case is \$5,021.00, subject to any limitations imposed by section 8-405(e)(2) of the Business Regulation Article. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015); COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:


ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$5,021.00, unless otherwise limited by section 8-405(e)(2) of the Business Regulation Article; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent (10%) as set by the Maryland Home Improvement Commission;¹⁰ and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

Signature on File

May 24, 2017
Date Decision Issued

Tara K. Lehner
Administrative Law Judge 

TKL/sw
#168247

¹⁰ See Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

PROPOSED ORDER

WHEREFORE, this 10th day of July, 2017, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Sachchida Gupta

***Sachchida Gupta
Panel B***

MARYLAND HOME IMPROVEMENT COMMISSION